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### Remarks Made at Pace University School of Law on October 23, 1993

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## ROBERT ROSENSTOCK† ††

I think that many of Professor Rubin's comments are interesting and of importance. That the members of the international community, acting under the Westphalian system, may chose to exercise their authority under that system and to form an International Court, in order to better provide rules and methods of protecting their citizens, is not an action inherently inconsistent with this system. It is an exercise of it. I think, in general, Professor Rubin's comments are not such as to go to the fundamentals of the problem, but merely to make interesting and valuable comments on aspects of its operation.

Mr. Ferencz has given a typically spirited account of the Nuremberg Court and the London Charter. I would like to speak briefly on some of what happened between that period and today and why.

First, a few comments on some of Professor Rubin's remarks. There are elements of victors' justice to Nuremberg and I don't think that that's deniable. But, that does not mean that there was injustice at Nuremberg. Not every participant in the conflict of the Second World War was tried before that court. Only one side was tried. There are other aspects in which it was victors' justice. Again, not injustice. I think the idea of taking Nuremberg and using it as a base for creating an International Criminal Court was, in part, the recognition of the need to go beyond what had been achieved in Nuremberg. And that's why the international community codified a great deal of the law that was relied upon in Nuremberg as reflective of international custom and the League Covenant,<sup>1</sup> the Kellog-Briand Pact<sup>2</sup> and other customs and usages.

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†† The following is a transcription of the comments made by Mr. Rosenstock at the symposium held at Pace University School of Law on October 23, 1993.

<sup>1</sup> LEAGUE OF NATIONS COVENANT.

<sup>2</sup> Kellog-Briand Pact, 1929, 94 L.N.T.S. 57.

The 1949 Geneva Convention<sup>3</sup> and the protocols thereto, the Genocide Convention<sup>4</sup> - are examples of this codification. The question is why wasn't the Nuremberg experience built on institutionally? Why wasn't an International Criminal Court created right away?

The primary reason, surely, was the Cold War. The split between East and West was such as to make any creation of an institution such as an International Criminal Court, for that reason alone, all but unattainable. Certainly a secondary reason was one of the points which Professor Rubin has alluded to, namely the unwillingness of states, particularly major powers, to contemplate their own officials being called before such a body. A tertiary reason was a host of technical problems, to which Professor Rubin has also referred. I don't think they are insoluble, but they are substantial.

For most of the fifties, sixties, seventies and eighties, a few lonely voices, such as Mr. Ferencz and Professor Bassiouni and one or two others held the torch aloft. They urged building on Nuremberg and creating an International Criminal Court as a standing body, but it didn't get anywhere. Then, approximately a decade ago, work was revived on something called "Draft Code of Crimes Against Peace and Security".<sup>5</sup> Partly because a code does suggest having a legal body to apply it, and partly for purely cynical reasons — those who opposed the idea of a draft code thought a good way to sink it would be to tie it to a court — the idea of an International Criminal Court was revived. The Soviet Union at that point drooled at the thought of the agitation propaganda possibilities that would flow from a draft code. But they did not want anything to do with the court.

Then, the Cold War ended. We had Pol Pot, we had Saddam Hussein and we had the situation in the Former Yugoslavia. Those who had assumed that the slogan "Never again" was a slogan that would not have great contemporary meaning because, of course, one would never see a repeat of what had led to

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<sup>3</sup> See Geneva Convention for the Amelioration of the Condition of the Wounded, and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31.

<sup>4</sup> Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>5</sup> Yearbook of the International Law, 1951, Vol. II, and 1954, Vol. II (New York: United Nations, 1951, 1954).

the existence of that slogan, began to see phrases such as "ethnic cleansing" used.

The International Law Commission, in 1992, began work as a response to a lot of these developments and pressure from the General Assembly which was itself reflecting responses to these developments. The Commission began work on a statute for an international criminal court. It sketched a rough outline of what such a court might look like. It laid down certain basics; that it should be established by statute in the form of a treaty; that it should have jurisdiction over private persons, not states; that its jurisdiction should extend to specify international treaties in force, defining crimes of an international character. The jurisdiction would be by consent, similar to that in Article 36 of the Statute of the ICJ.<sup>6</sup> Also, that it wouldn't be a standing full time body, but would meet as required.

Then, the General Assembly in the Fall of 1992 told the Law Commission to go ahead and draft on that basis. In the Spring of 1993, an Ad Hoc Tribunal was created by the Security Council. The Committee produced a preliminary draft in the Summer of 1993 which is before the current General Assembly and is that which governments will be commenting on over the next week or two. I think that most of the comments will be generally favorable. I do not think that very many governments will have the temerity to flatly oppose the idea of such a court.

The subject matter jurisdiction that the Commission suggests are grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, crimes against humanity and crimes under the terrorism conventions. This is also substantially the same pattern as followed in the creation of the Ad Hoc Tribunal on Yugoslavia to which a lot of reference has been made by previous speakers.

To what extent the problems various previous speakers have referred to will create impenetrable barriers to success for the Ad Hoc Tribunal will prove itself over the course of time. Suffice it to say that the Security Council created the body under Chapter 7 of the U.N. Charter.<sup>7</sup> This gives rise to bind-

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<sup>6</sup> *Statute of the International Court of Justice*, 59 Stat. 1055 (1945), TS No. 933, Art. 36.

<sup>7</sup> Signed at San Francisco on June 26, 1945; entered into force on Oct. 24, 1945, 1976 Y.B.U.N. 1043.

ing obligations to cooperate with the Tribunal, and therefore, a request to a state to extradite somebody will give rise to a binding legal obligation. If that individual is not extradited, that individual will, at a minimum, be unable to leave whatever state it is that he's in that is not willing to extradite him. He will be under an expansive house arrest.

Moreover, the Security Council has demonstrated in the case of Libya, to which reference was made, that when Libya refused to honor a request from the Security Council to make the suspects believed responsible for the downing of Pan Am 103 and the UTA, a French airline in Africa, available for trial, the Security Council was prepared to invoke economic sanctions against Libya. The Security Council is now in the process of tightening those sanctions, I think it is very premature to suggest that the process won't work.

I also think that although the problems with the Tribunal for Yugoslavia and an International Criminal Court are easy to set out, this is a moment when a variety of forces have come together to make possible the progress that has been made toward the creation of an Ad Hoc Tribunal for Yugoslavia and the drafting of an international statute. We ought to give it a try. If it doesn't work, it doesn't work. Some of the problems to which Professor Rubin referred may very well be acute and incapable of solution. I don't think any of the problems are fundamental or systemic. I think almost all, if not all, of them can be dealt with as we operate the system and therefore, I don't think this is a moment we should miss by hesitating, by being unwilling to give it a try. A great deal will depend on how the Ad Hoc Tribunal works, but a great deal will also depend on how many of the problems raised by Professor Rubin, and that will be raised by delegations in the Sixth Committee, can be resolved or ameliorated by the International Law Commission at its 1994 session.